



Gor & another v County Government of Homa-Bay & 8 others; County Director of Environment (Interested Party) (Petition E001 of 2024) [2025] KEELC 5041 (KLR) (30 June 2025) (Ruling)

Neutral citation: [2025] KEELC 5041 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
PETITION E001 OF 2024
FO NYAGAKA, J
JUNE 30, 2025**

BETWEEN

**EVANCE OTIENO OLOO GOR 1ST PETITIONER
MICHAEL KOJO OTIENO 2ND PETITIONER**

AND

**COUNTY GOVERNMENT OF HOMA-BAY 1ST RESPONDENT
GOVERNOR OF HOMA-BAY 2ND RESPONDENT
COUNTY EXECUTIVE MEMBER FOR LANDS, HOUSING . 3RD RESPONDENT
NATIONAL LAND COMMISSION 4TH RESPONDENT
COUNTY ATTORNEY 5TH RESPONDENT
COUNTY PENSION FUND 6TH RESPONDENT
COUNTY ASSEMBLY OF HOMA-BAY 7TH RESPONDENT
CLERK COUNTY ASSEMBLY OF HOMA-BAY 8TH RESPONDENT
SHIV CONSTRUCTION CO. LTD 9TH RESPONDENT**

AND

COUNTY DIRECTOR OF ENVIRONMENT INTERESTED PARTY

RULING

1. The Petitioners brought this Petition dated 29th July 2024. It was the Petitioners’ case that The Petitioners pleaded the following facts which they relied on. First, that the County Government of Homabay had entered into a deal with the County Pension Fund (CPF) to build an office on a five (5)



acre parcel of land, being Kanyada/Kanyabala/3537 to finance the construction of its headquarters and recoup its investments through a tenant purchase scheme without the input of the County Assembly as anchored in law, public participation and without following the process of change of user as anchored in the law. The Respondents had never applied for amalgamation and change of user from agricultural to comprehensive development without public input as anchored under Article 10, 35, 46 and 47 of the Constitution. The exercise was being done without the input of the county Physical and Land Use Planning and Technical Committee; no environmental impact assessment study had been issued to date entailing extensive public participation and consultations with residents in the area of jurisdiction of Homabay Town Constituency. The exercise was being done in bad faith and actuated by malice and personal vendetta, and with classism and was an abuse of the dignity of the people of Kenya. The step of changing the use of the property was not accomplished as required by the law.

2. Further, the consent to release the parcel of land by the County Government to the account Pension Scheme would see the pension scheme hold it for 31 years contrary to the wishes of the residents of Homa Bay, especially Homa Bay Sub County. The actions of the County Government over the lease in questions regarding the implementation were based on the fact that there were no resolutions made by the Cabinet and presented before the County Assembly for the same for adoption. Further, the law was explicitly clear on transfer of government land. The instant one was done without the input of the people and their representatives, hence defeating the purpose.
3. Regarding the national values and principles of governance, Section 76 of the Physical Land Use and Planning Act which establishes the County Physical Planning Committee was not followed while Section 78 did not apply. And therefore the Article 69 of the Constitution, which guarantees the petitioner's rights to meaningfully participate in the management and conservation of the environment and Article 35 which guarantees the right to information were breached.
4. The main issue was that during the previous regime, a flagship project was initiated whereby the hometown subcounty was to benefit from the Arujo Farm Feed.
5. The Petitioners then posed a question: where did the local natives of Kanyada agree that the project was to be demolished and an office constructed? They concluded that, "in essence, there was no public participation and no value for money will be meted" (sic).
6. They went further to plead that the construction of the Governor's Office on the above property violated the Physical Planning Act and various policies, including the Physical Development Plan.
7. The Petitioners then pleaded an unclear paragraph, to wit 64, to the effect that "the under the Constitution, the County Governments Act and the Physical Planning Act of 2019 are mandated to plan terms and issue change of user."
8. They pleaded further that they were aggrieved that the deal posed threats to express provisions of the Constitution, including:
 - a. Irregularities and breach of the Constitution. Without approval of the assembly.
 - b. Lack of public participation.
 - c. Lack of competitive sourcing and leasing public land.
9. That the County Government was forcefully constructing the offices without public participation of the people as a priority with the purpose of acquisition of the property to the County Pension Fund was unjust imposing a morally unfit one size fits all approach to property acquisition.



10. Further, Parliament was considering provisions of a Bill which would arbitrarily deprive lease land over their right to property, yet Article 40(2) provides that Parliament would not enact a law that permits the state to arbitrarily deprive a person of private property.
11. The Petition sought the following relieves.
 - a. Whether there are inherent natural and constitutional limitations on the power of the political arms of government which limitations protect lease of land from capricious and reasonable and fair and arbitrary, excessive, cruel and significantly unpatriotic lease land.
 - b. Whether the commitment of public funds to a private entity, the public input is required which is to be authorized by County Assembly and should be repaid by Kenyans without the County Assembly's approval and all were used to benefit private entities who should repay them.
12. The Petitioners therefore sought a declaration that;
 1. There are inherent natural law and constitutional limitations on the power of the political arms of government to impose land leases, which limitations protect taxpayers from capricious, reasonable arbitrary, excessive and significantly unpatriotic lease of public land to a private entity without the input of the County Physical and Land Use Planning Liaison Committee.
 2. By failing to publish or publicize the land lease to members of the public, it is a threat to the Constitution of which the Respondents failed to uphold and therefore contrary to Articles 10, 35, 44, 47 and 201 of the Constitution.
 3. Further, they prayed for an order quashing the lease agreement between the government, the Government of Homabay and the County Pension Scheme.
 4. An order compelling the Respondents to ensure that the status of the project done by the tax payers' money in Araujo which was for agricultural purposes is done as initially it was and the cost to be borne by the Governor from her own pocket.
 5. An order for each party to bear their own costs.

The Preliminary Objection

13. Upon the filing of the Petition, the 1st, 2nd, 3rd and 5th Respondents raised a Preliminary Objection dated 20th August 2024 against the Petition and Notice of motion dated 29th July 2024 which is the basis of this ruling. The Respondent, in its Preliminary Objection, raised the following grounds;
 1. That this Honourable court lacks jurisdiction to entertain the Petition and the Application thereof by virtue of the mandatory provision of section 129 of the Environment Management and Coordination Act.
 2. That this Honourable Court lacks jurisdiction to hear and determine the matter by virtue of mandatory provision of section 9 of the Public Procurement and Asset Disposal Act, 2015.
 3. That the Petitioners have failed to exhaust the primary dispute resolution forum underpinned in sections 9, 11, 14 and 22 of the Access to information Act and as such, the Petition and Application dated 29th July 2024 are bad in law and ought to be struck out in limine.



4. That the Petition and Application dated 29th July 2024 fail to disclose constitutional violations, are premised on wrong and inapplicable provisions of law hence incompetent, defective, misconceived, frivolous, vexatious and tantamount to abuse of the court processes.
14. The 9th Respondent opposed the Petition vide a Grounds of Opposition dated 10/09/2024. It stated that the 9th Respondent opposes the application on the following grounds;
1. That the 9th Respondent herein is not a proper party in this suit as no allegations of the Petitioners/Applicants point out any wrongful conduct of the 9th Respondent as to warrant the defence of this Petition and/or the Application neither has the Petitioners/Applicants provided the relevant provisions of law violated by the 9th Respondent.
 2. That the Applicants' Petition and Notice of Motion Application dated the 29th July 2024 are premature as the Applicants herein did not exhaust the local remedies available under the provisions of sections 125 and 129 of the National Environment and Coordination Act, section 14 of the Access to Information Act and sections 9, 27 and 28 of the Public Procurement and Asset Disposal Act.
 3. That section 14 of the Access to Information Act mandates the Commission on Administrative Justice and extends its Jurisdiction to review decisions made by institutions regarding request for access to information whereby any person aggrieved by a decision refusing to grant access to the information applied for may apply in writing to the Commission.
 4. That section 125 of the Environmental Management and Coordination Act establishes the National Environment Tribunal while section 129 mandates that the decisions made by the Director-General, the Authority or Committees of the Authority or their agents under the Act may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.
 5. That section 9 of the Public Procurement and Asset Disposal Act mandates the Public Procurement Regulatory Authority with the power and/or Jurisdiction to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review.
 6. That section 27 of the Public Procurement and Asset Disposal Act establishes a Central Independent Procurement Appeals Review Board to be known as the Public Procurement Administrative Review Board as an unincorporated Board whereas section 28 mandates the Board with the core fiction/power of reviewing, hearing and determining tendering and asset disposal disputes.
 7. That (my) Advocates on record have advised me, which advice I verily believe to be true, that over and over again, the Courts of law have held that where a local remedy is provided for under a Statute, such an avenue Must be resorted to and effectively exhausted before approaching the Court for relief.
 8. That in Nairobi Environment and Land Case No.E951 of 2021: Robert Khamala Situma & 8 others v Acting Clerk, of the Nairobi City County Assembly [2022] eKLR, the court while concurring with the decision in Republic v National Environment Management Authority Ex parte Sound Equipment Ltd, (supra), observed that: -



- a. "... Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it..."
9. That additionally, in the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR, the Court held as follows;
 - a. "The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts."
 10. That in the foregoing, it clearly emerges beyond any peradventure that this Honourable Court lacks Jurisdiction to entertain this matter in view of the doctrine of Exhaustion of Local Administrative remedies couched in mandatory terms under the provisions of sections 125 and 129 of the *National Environment and Coordination Act*, section 14 of the *Access to Information Act* and sections 9, 27 and 28 of the *Public Procurement and Asset Disposal Act* and the precedents set in the above cited authorities.

The submissions

15. The 1st, 2nd, 4th and 5th Respondents filed Submissions dated 14th October 2024 and Supplementary submissions dated 7th February 2025 in support of the Preliminary Objection.
16. On whether the court has Jurisdiction, the Respondents placed reliance on the case of Owners of the Motor Vessel Lillian S. v Caltex (Kenya) Ltd [1989] eKLR and pointed out that although courts have Jurisdiction flowing from the *Constitution* to try both civil and criminal matters, Section 5 of the *Civil Procedure Act*, 2010 limits courts in exercise of their Jurisdiction. The Respondents further submitted that this Court lacks Jurisdiction to entertain the Petition and the Application by virtue of the mandatory provisions of Section 129 of the *Environment Management and Coordination Act*. Additionally, that the issues raised should have been placed at the National Environment Tribunal as the primary forum.
17. It is the Respondents' case that in the activity like the one envisaged by the applicants herein, it is the authority under section 63 of *EMCA* that has the mandate to issue the same. He submitted that Section 125 of the *Environmental Management and Coordination Act* establishes the National Environmental Tribunal while section 129 mandates that the decisions made by the Director General, the Authority or Committees of the Authority or their agents under the Act may be subject to an appeal to the Tribunal. Further, that section 68 of *EMCA* created National Environmental tribunal with Jurisdiction to deal with issuance of licenses by NEMA and that any dissatisfaction arising from the same is to be taken to the National Environment.
18. The Respondents submitted that the issue before the Court is about a license issued to the 1st and 2nd Respondents by the NEMA. They urged that the matter was improperly before court and referred the



court to the Supreme Court decision in the case of *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others* (SC Petition No 3 of 2016, [2019] eKLR where the court affirmed the doctrine of exhaustion. They additionally cited the cases of Busia HCC No.8 of 2011, Nakuru Petition No.26 of 2014, and Kisumu High Court Civil Case No.22 of 2011 and Nairobi Environment and Land Case No. E951 of 2021: *Robert Khamala Situma & 8 Others v Acting Clerk of the Nairobi City County Assembly* (2022) eKLR in this regard.

19. The Respondents further submitted that this court lacks Jurisdiction by dint of the provisions of the *Public Procurement and Asset Disposal Act*, 2015. That Section 27 of the *PPADA* establishes the Public Procurement Administrative Review Board (“the Review Board”) with Jurisdiction to review, hear and determine tendering and asset disposal disputes in public procurement. Further, that section 8 of the *Public Procurement and Asset Disposal Act*, 2025 establishes the Public Regulatory Authority with Jurisdiction to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review. They maintained that in the absence of a decision from the Authority, the Jurisdiction of this Court has been prematurely invoked.
20. The Respondents submitted that Section 9 of the *Public Procurement and Asset Disposal Act* mandates the Public Procurement Regulatory Authority with the power and Jurisdiction to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review. Additionally, that with regards to Access of information as alluded to in the petition, any dissatisfaction has a recourse through the dispute resolution forum provided for under sections 9,11,14 and 22 of the *Access to information Act* which were not exhausted before invoking Jurisdiction of the Court. They reiterated that the Petitioners have not provided the exceptional circumstances warranting the bypassing the statutory remedy to this Court.
21. The Respondents pointed out that Section 14 of the *Access to Information Act* mandates the Commission on Administrative Justice and extends its Jurisdiction to review decisions made by institutions regarding the request for access to information. Further, that where any person is aggrieved by a decision refusing to grant access to the information applied for, they may apply in writing to the Commission. They submitted that the Act provides that the complaints on denial of access to information must be pursued within the provisions of section 9, 11, 14 and 22 of the act. In this regard, he cited the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslim for Human Rights & 2 others (interested parties)* (2020) eKLR. Additionally, counsel placed reliance on the ratio decidendi in *Joseph Njuguna Mwaura & Others v Republic* [2013] eKLR and urged that the Respondents have demonstrated that the Petitioners have failed to exhaust the available primary forums and statutory alternative remedy. They maintained that the Petitioners have failed to cogently demonstrate any constitutional violation and therefore ought to be struck out for want of Jurisdiction.
22. On the issue of costs, counsel placed reliance on the case of *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others*, SC Petition No. 4 of 2012, urging that it is trite law that costs follow the event and that they are granted at the discretion of the Court. He additionally cited Section 27 of the *Civil Procedure Act* and urged that costs be borne with the Petitioners.
23. In their Supplementary Submissions, as a rejoinder to the Petitioners’ submissions, the Respondents argued that contrary to the Petitioners’ assertions, the subject Preliminary objection raises a pure point of law. Further, that the Preliminary objection was about Jurisdiction of the court and the doctrine of exhaustion and therefore does not require evidence or facts to be ascertained. They stated that on the face of record and pleadings, one only needs to ask whether this court can handle procurement matter, physical planning complaints, NEMA licensing matters or mixed issues at the first port of



call. They maintained that the Preliminary Objection clearly and overwhelmingly meets the tests in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969]EA 696. Further, that in contravention of the doctrine of exhaustion, the Petition dated 29th July 2024 raises various issues including procurement, access to justice and NEMA licensing which ought to be heard and the primary statutory forum.

24. The Respondents sought to distinguish the Supreme Court decision *Abidha Nicholus v The Attorney General & 7 Others* (2023) eKLR by submitting that contrary to the Petitioners' assertions in their written submissions dated 4th February 2025, the Supreme Court did not invalidate or quash the doctrine of exhaustion. It actually promoted doctrine of exhaustion as buttressed in the Supreme Court decision in *Kibos Distillers Limited & 4 others v Benson Ambuti Adegga & 3 others* [2020] eKLR. Further, that the Supreme Court gave guidelines on how trial court can treat mixed suits or multifaceted suits that require adjudication at the statutory primary bodies but also clothed with constitutional claims. They pointed out that the Supreme Court opined that it was necessary for the court to determine whether the suitability of the statutory appeal within the context of the peculiarity of each case.
25. The Respondents argued that the Petitioners have not demonstrated whether they sought exceptions under the Fair Administrative Act to bypass the primary statutory forums and as such, they are in violation of the doctrine of exhaustion. They urged the court to dismiss the Petition and the Application.

6th Respondents Submissions

26. The 6th Respondent filed submissions dated 7th February 2025 in support of the Preliminary Objection. Counsel for the Respondent referred the court to the definition of exhaustion of remedies as per the *Black's Laws Dictionary* 9th and submitted that the Court's Jurisdiction has been wrongly and improperly invoked. Additionally, that the Petition is premature and offends the doctrine of exhaustion of remedies. The Respondent submitted that section 9 of the *Public Procurement and Asset Disposal Act*, 2015 provides for a specific mechanism for resolution of disputes relating to or arising out of complaint arising from procurement process to any aggrieved person who was not a party to the tendering process. Further, that the original Jurisdiction pertaining to the dispute complaints raised by the petitioners on the procurement process is Public Procurement Regulatory Authority.
27. The 6th Respondent further submitted that Section 14 of the *Access to Information Act* mandates the Commission on Administrative Justice to review decisions made by institutions regarding the request for access to information. Additionally, that Section 22 of the *Access to Information Act* also provides for an avenue of lodging any complaints under the Act through the secretary or to any person duly authorized by the commission for that purpose. The Respondent stated that there are clearly established procedures in resolving complaints raised by the Petitioners. Further, that the original Jurisdiction pertaining to the complaints with regard to the access of information is resolved through the Commission on Administrative Justice before moving to court. To buttress this position, the Respondent placed reliance on the cases of Nairobi Constitutional and Human Rights Division Constitutional Petition No. 201 of 2019 - *Savraj Singh Ghana v Diamond Trust Bank (Kenya) Limited & Another* (2020) eKLR and Siaya High Court Constitutional Petition No. 2A of 2020 – *Charles Apudo Obare & Another v Cleric County Assembly & Another* [2020] eKLR.
28. The 6th Respondent reiterated that the Petitioner has prematurely come to this court seeking relief and further, argued that the Petitioners have selectively bypassed Public Procurement Regulatory Authority and the Commission on Administrative Justice directly to this court.



29. The 6th Respondent posited that the question therefore that follows this background is what then invokes the doctrine of exhaustion before embarking on the Court process. Further, that this was aptly discussed in Environment and Land Court at Iten Constitutional petition 007 of 2022; *Legal Advice Centre T/A Kituo Cha Sheria & Another v Attorney General & 7 Others; (Law Society of Kenya & Another Interested Parties): Kenya Legal and Ethical Issues Network on HIV & AIDS (KELIN) & Another Amicus Curiae* (Constitutional Petition 007 of 2022) (2024) KEELC 1521 (KIR) (20 March 2024) (Ruling). The Respondent additionally cited the case of Employment and Labour Relations Court Petition E166 of 2022 – *Okoti v Parliamentary Service Commission & 2 others: Speaker of the National Assembly & Another (Interested Parties)* (Petition E166 of 2022) F20231 KEELRC 252 eKLR) (7 February 2023) (Ruling) in support of this submission.
30. The Respondent submitted that it is only where the adequacy and availability of the mechanism for dispute resolution is deemed wanting that creates an exceptional case that allows the Court to intervene. In this regard, he placed reliance on the case of Nairobi High Court Judicial Review No. 359 of 2018 – *Krystalline Salt Limited v Kenya revenue Authority* (2019) eKLR.
31. The Respondent argued that the Petitioners have not tabled any scintilla of evidence to demonstrate that the alternative dispute resolution mechanism is too rigid that makes it impossible for them to address their grievances through the laid down internal dispute resolution mechanism. Further, that the petitioners have not demonstrated any exceptional circumstances that the internal remedy would not be effective or its pursuit would be futile. Accordingly, they must exhaust other mechanisms provided by the *Access to Information Act* and *Public Procurement and Asset Disposal Act*. 2015 and having failed to demonstrate any special circumstance to warrant them bypass the alternative dispute resolution mechanism, it follows that this Court has no Jurisdiction to hear the matter in the first instance.
32. The Respondent pointed out that the first port of call of these grievances are the Public Procurement Authority and Commission for Administrative of Justice before moving to court. That in light of this, this Court lacks Jurisdiction to issue the orders sought by the Petitioners. The Respondents placed reliance on the decision in Supreme Court of Kenya Application No. 2 of 2011- *Samuel Kamau Macharia & Another v Kenya Commercial bank Ltd & Another* [2012] eKLR and Mombasa Civil Appeal No. 50 of 1989, *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR. They urged the court to dismiss both the application and the Petition.

9th Respondents’ submissions

33. The 9th Respondent filed submissions dated 25th November 2024 in support of the Preliminary Objection. On Jurisdiction, they quoted the holding in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR. They urged that this Court lacks Jurisdiction to determine this Petition and Application, rendering this Petition immature as the Applicants did not exhaust the remedies available under the provisions of sections 125 and 129 of the National Environment and Coordination Act, section 14 of the *Access to Information Act* and sections 9, 27 and 28 of the *Public Procurement and Asset Disposal Act*.
34. The 9th Respondent pointed out that Section 14 of the *Access to Information Act* mandates the Commission on Administrative Justice and extends its Jurisdiction to review decisions made by institutions regarding request for access to information whereby any person aggrieved by a decision refusing to grant access to the information applied for may apply in writing to the Commission. Additionally, that the Applicant has not adduced any evidence in Court to the effect that he attempted to apply for review at the offices of the Commission on Administrative Justice with regards to the



- decisions of the relevant holders of the offices in which the Applicants alleges to have visited to seek information with no success. They posited that the Applicants never lodged any dispute before the National Environment Tribunal as required under the provisions of section 129 of the Environmental Management and Coordination Act, which is established as an Appellate body for the decisions made by the Director-General, the Authority or Committees of the Authority or their agents under the Act.
35. Regarding the disputes under the provisions of *Public Procurement and Asset Disposal Act*, the Respondent submitted that section 9 of the *Public Procurement and Asset Disposal Act* mandates the Public Procurement Regulatory Authority with the power and Jurisdiction to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review. Additionally, that section 27 of the *Public Procurement and Asset Disposal Act* establishes a Central Independent Procurement Appeals Review Board to be known as the Public Procurement Administrative Review Board. He pointed out that section 28 mandates the Board with the core power of reviewing, hearing and determining tendering and asset disposal disputes.
 36. The Respondents submitted that the Courts have held that where a local remedy is provided for under a Statute, such an avenue Must be resorted to and effectively exhausted before approaching the Court for relief. They placed reliance on the case of Nairobi Environment and Land Case No.E951 of 2021: *Robert Khamala Situma & 8 others v Acting Clerk of the Nairobi City County Assembly* [2022] eKLR and the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR.
 37. The Respondents joined the 1st 2nd , 4th and 5th Respondents in submitting that the petition is one that squarely and exclusively falls under the Jurisdictional ambits of the National Environmental Tribunal as established under the provisions of sections 125 and 129 of the *National Environment and Coordination Act* and the dispute resolution fora set out under the provisions section 14 of the *Access to Information Act* and sections 9, 27 and 28 of the *Public Procurement and Asset Disposal Act*. He reiterated that the Petitioners have failed to exhaust the primary remedy available under the aforementioned legislations. They prayed that the Petition and Notice of Motion both dated the 29th July 2024 be dismissed with costs.

Petitioners' Submissions

38. The petitioners filed submissions dated 4th February 2025 in response to the preliminary objection. They argued that the Preliminary Objection rests on the proposition that, when raised, its fundamental accomplishment will have a bearing on disposing of a matter because it raises pure points of law. They underscored the need for prudent management of time as a Court resource by summarily flagging out a frail and hopeless suit that if admitted to full trial, will be a waste of judicial time and will not serve the interest of justice. In this regard, they placed reliance on the holding of Ogola J in *DJC v BKL* (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling) and additionally, he cited the cases of *David Karobia Kiiru v Charles Nderitu Gitoi & Another* [2008] eKLR, *Grace Mwenda Munjuri v Trustees of the Agricultural Society of Kenya* [2017] eKLR.
39. The Petitioners urged that section 129 cited by the objectors is a way of misleading the court and further, that the Respondents rely on the above cited section of the law which deals with licensing and licences, of which the petition does not emanate from. They sought to point out that it emanates from violations of Articles 35, 40, 46, 47, 71, 73(1) and 75(1) of the *Constitution* of Kenya as read with sections 76 and 78 of the County Physical Act.



40. The Petitioner referred the court to the case of *Paul Onyera v Superior Homes* Petition E007 of 2023 eKLR and argued that the Petition does not way seek for the nullification of the development approvals or the Environmental licenses issued. Further, that the Respondents are trying to use their own omission to slam shut the doors of justice of which the petitioners have the right to access this court if there's a threat to the *Constitution*. The Petitioners submitted that no pure point of law has been raised by the Respondents and hence, the Preliminary Objection is not merited.
41. The Petitioner posited that from the prayers sought for in both the application and the Petition, this court is vested with the Jurisdiction under Article 162 (2) (b) of the *Constitution*. He cited Sections 13 (1) and (2) of the *Environment and Land Act*, arguing that what is before this court is an environmental constitutional petition on enforcement of environmental rights of which the petitioners have alleged to have been infringed or are being violated by the Respondents. That the Petitioners are seeking for a determination as to whether there can be change of use effected without the input of the county physical and land use planning liaison committee.
42. The Petitioners urged that they are apprehensive that Tribunal does not have the mandate to deal with constitutional violations relating to environment which is a sole preserve of this court. On the Right to Access Information, the Petitioners referred the court to Principle 10 of the *Rio Declaration on Environment and Development*, 1992 and Article 9(1) of *Africa Charter on Human and People's Rights*, urging that the paramount significance of this right and conscientiously incorporates article 35 which guarantees the right of every citizen to: access information held by the state: and information held by another person and required for the exercise or protection of any right or fundamental freedom. They further stated that pursuant to article 35 (3), the state is obligated to publish and publicise any important information affecting the nation. The Petitioners pointed out that these constitutional provisions are buttressed by the *Access to Information Act*, 2016 which was enacted to give effect to article 35 of the *Constitution* and to provide a framework for disclosure of information by public and private entities to the public based on constitutional principles relating to accountability, transparency and public participation and access to information.
43. The Petitioners submitted that Section 6 of the *Fair Administrative Action Act* of 2015 provides that a person who is materially or adversely affected by an administrative action has a right to be supplied with information that may be necessary to facilitate their application for appeal or review. Further, that the court, in its establishment, determines disputes relating to use and occupation of land, title to land and additionally, that the doctrine of exhaustion was dealt with by the Supreme Court of Kenya in the case of *Abidha Nicholas v. the Attorney General & 7 Others* (2023) eKLR. The Respondents submitted that the Supreme Court distinguished the case of *Kibos Distillers Ltd v. Benson Atega Ambuti* referred to by the Respondents.
44. The petitioners argued that Access to Information with regard to construction of County headquarters and leasing of the land to a private developer, fiscal transparency does not fall within the purview of the National Environment Tribunal but this court, whereas the scope of the Tribunal (NET) is limited to the disputes under Section 129 on licences and licensing under *EMCA*. They placed reliance on the case of *West Kenya Sugar Co. Limited v Busia Sugar Industries Limited & 2 Others* [2017] eKLR in this regard.
45. The Petitioners submitted that pursuant to section 13 (d) of the *Environment and Land Court Act*, this court is vested with Jurisdiction being that the project is being undertaken in public. Further, that the Preliminary Objection is incompetent, misplaced for reasons that it does not raised any pure point of law and the same should be dismissed with costs.



Interested Party's Submissions

46. The interested party filed skeletal submissions dated 17th February 2025 in opposition to the Preliminary Objection. It submitted that the doctrine of exhaustion has since been re-shaped by the Supreme Court so as to state that this Court can hear this Petition as it is. Further, that it matters not that the Petition is multifaceted or that alternative procedures exist in law. Counsel referred to the decision in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* (Petition E007 of 2023) [2023] KESC113 (KLR) (28 December 2023) (Judgment) arguing that the same is already being implemented by this Court as seen in the decision by Makori J in *Legal Advice Centre t/a Kituo Cha Sberia v National Environment Management Authority & 5 others* (Petition E002 of 2023) [2024] KEELC 4133 (KLR) (9 May 2024) (Ruling) Neutral citation: [2024] KEELC 4133 (KLR). He urged the court to proceed with the hearing of the Petition as it is.

Analysis and Determination

47. This Court has considered the Objection, the law itself, the pleadings and the submissions by the parties. A number of issues arise as determined below. But to start with this court begins to with an exposition of what a preliminary objection is.
48. The locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 defined a Preliminary Objection as follows:

“ A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

... A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

49. It is clear that a preliminary objection arises on a point of law only. Any factual point and matter that requires long drawn out argument to establish other than the law falls short of a preliminary objection. Any prayer to uphold it as such is discarded and left for determination at the merits stage. For these reasons, this court proceeds to analyse the points raised herein to consider whether or not they fall within the ambit of a preliminary objection.
50. The first one is that the Court does not have the requisite jurisdiction to hear and determine this matter. The Respondents contend that by virtue of the mandatory provisions of section 129 of the *Environment Management and Coordination Act*
51. Section 129 (1) (e) of *EMCA* provides that:
- (1) Any person who is aggrieved by -
 - (a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;



- (b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;
 - (c) the revocation, suspension or variation of the person's licence under this Act or its regulations;
 - (d) the amount of money required to be paid as a fee under this Act or its regulations;
 - (e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations, may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.
- (2) Any person who is aggrieved:- Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions as may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.'
52. Section 13 (1) of the *Environment and Land Court Act* confers jurisdiction to the Environment and Land Court and stipulates as follows:
- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under Article 162 (2) (b) of the *Constitution*, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
53. The above provisions are distinct in terms of jurisdiction of the National Environment Tribunal and the Environment and Land Court.
54. The reliefs sought in the Petition are about alleged constitutional violations arising from the actions of the Respondents. They do not relate to issuance of a licence which may or may not have been denied. They relate to the building of an office for and on behalf of the County Government of Homabay through the County Pension Fund on a five acre piece of land known as Kanyada/Kanyabala/3537, and the acts attendant thereto which the Petitioners allege are a threat to fundamental rights and freedoms of the persons the Petitioners allege they represent. It is, therefore, evident that the dispute is not related to matters under the jurisdiction of the National Environment Tribunal, more so under section 129 of the *Environment Management and Coordination Act*.



55. In *West Kenya Sugar Company Limited v Busia Sugar Industries Ltd & 2 others* [2017] KEELC 3395 (KLR) the court expressed itself on a similar issue as follows;

“This argument that this court has no jurisdiction is based on a misunderstanding of the matter before this court. What is before the court is a constitutional petition in which the petitioner has alleged several violations of his rights enshrined in the *Constitution*. The National Environment Tribunal does not have mandate to deal with constitutional violations that relate to environment. That is a preserve of this Court. A look at the mandate given to the National Environment Tribunal under section 129 of *EMCA* aforesaid shows a limited scope of the matters it can handle on appeal. They particularly deal with licence and licensing.”

56. The upshot of the foregoing is that, on this point the Preliminary Objection fails.

57. This Court proceeds to determine the other limbs of the Objection. The Respondents contend that this court lacks jurisdiction to determine this matter by virtue of section 9 of the *Public Procurement and Disposal Act*. Section 9 of the *Act* lists the functions of the Public Procurement Regulatory Authority. The Petition does not disclose any action related those acts, namely (a) procurement planning; (b) procurement processing; (c) inventory and asset management; (d) disposal of assets; and (e) contract management as per section 4 of the *Public Procurement and Asset Disposal Act*. The petitioners refer to the existence of a ‘lease 2023’ in the Petition and a Bill under the process of enactment in other parts thereof. There is nothing about procurement in the Petition. On that ground, the Preliminary Objection fails.

Whether the Petitioners have failed to exhaust the primary dispute resolution under the Access to Information Act

58. Section 9 of the *Access to Information act* refers to processing of an application for access to information, section 11 is on providing access to information, section 14 is on Review of decisions by the Commission and section 22 is on inquiry into complaints. The Act confers on the Commission on Administrative Justice oversight and enforcement functions and powers to give effect to Article 35 of the *Constitution*. The only mention of Article 35 is in the prayers of the petition. The Petitioners, in the nature of the main violations and threats to the *Constitution*, have not disclosed any violations in regards to Article 35 of the *Constitution*. It follows that the Preliminary Objection would succeed on this ground, but to the extent of failure to show any violation in terms of disclosure of information.
59. This brings is to the issue of whether the Petition discloses Constitutional violations. The Court of Appeal, in *Gabriel Mutava & 2 Others v Managing Director, Kenya Ports Authority* (2016) eKLR held as follows;

“Constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums.

Constitutional litigation is not a panacea for all manner of litigation; we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”



60. Rule 10(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* 2013 provides as follows;

“ 10.

- (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
- (2) The petition shall disclose the following—
 - (a) the petitioner’s name and address;
 - (b) the facts relied upon;
 - (c) the constitutional provision violated;
 - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
 - (g) the relief sought by the petitioner.”

61. This Court is additionally guided by the holding of the court in *Anarita Karimi Njeru v Republic* (1979) eKLR where the court set out the legal threshold for a Constitutional Petition thus;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

62. The Court of Appeal restated this principle in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR as follows:

“(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior Court below to lament that the petition before it



was not the “epitome of precise, comprehensive or elegant drafting, without remedy by the 1st respondent.

It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of the *Constitution* of Kenya and the *Ethics and Anti-corruption Commission Act, 2011*, accordingly the petition did not meet the standard enunciated in the *Anarita Karimi Njeru* case.”

63. The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* 2013, provide that a party seeking for the enforcement of rights and freedoms under Articles 22 and 23 of the *Constitution* ought to outline the nature rights and freedoms infringed, threatened or violated, the nature of injuries or loss or damage and the reliefs sought.
64. In the case of *Gabriel Mutava & 2 others v Managing Director Kenya Posts Authority and another* (2016) eKLR the learned judge emphasized that where there are other sufficient and adequate avenues to resolve a dispute, a complainant should first use it and not trivialize the jurisdiction of the constitutional court by moving it anyhow.
65. Further in case a fundamental right is regulated by legislation such, for instance, the Physical Planning Act that process ought to be exhausted first. The Petitioners herein allege that the Respondents failed to follow the provisions of the Act. The Petitioners did not plead how the Petitioners failed to follow the provisions of the law regarding the Liaison Committee.
66. In *Kusow Billow Issack v Ministry of Interior and Coordination of National Government & 3 others* [2021] eKLR the court underscored the importance of a party claiming a constitutional violation, infringement or threat to plead with precision the provisions of the *Constitution* he alleges to have been breached and the nature of breach. This is not the nature of the Petition before me. As I have stated elsewhere, it is a grope in darkness, including it being a fishing expedition. While the Petitioners allege that there was no public participation in the process of leasing the land to the County Pension Fund, they did not indicate when the process began or indeed where they know when it did and how it progressed to get to the point of the lease in question being created. They therefore did not disclose that there was or was no public participation prior to the alleged acts of violation or threats. Again, they did not indicate anywhere that they sought this information from the Respondents and did not receive it. This also goes to this court finding that there was there was demonstration of a violation of the petitioners or other persons they represent of their right to information under the Article 35 of *Constitution* 2010 and Freedom of Information Act.
67. Thus, I have considered the issues raised in the Petition and the nature of the violations of the *Constitution* alleged by the Petitioner. The Petitioner contends that the ‘lease 2023’ constitutes a cascading threat to various provisions of the *constitution*. To begin with, it is not even clear what exact document that the petitioners refer to as the lease in their Petition, they vary from referring to a ‘lease 2023, a ‘lease’ and at some point, a ‘bill. A precursory look at the Petition reveals that the Petition is not pleaded with precision required in Constitutional Petitions. There are no adequate particulars as to the claims relating to the violations of the *Constitution* of Kenya.
68. The Petitioners claim that the lease poses a threat to article 25 of the *Constitution* of Kenya which is the right to a fair trial. There is no nexus between the alleged lease and the right to a fair trial. Additionally, Articles 48, 50 and 159 of the *Constitution* which relate to Access to Justice, the Right to a fair trial and Judicial Authority are mentioned as having been violated. There is no correlation between a ‘lease’ and



the provisions of these articles as there was no hearing referred to in the Petition. Further, on the threat to a right to property, the Constitutional provisions on the same are with regards to private property whereas the property allegedly involved herein is public property. It follows that the Petition does not disclose any violations with regard to said articles of the Constitution.

69. The Petitioners allege a violation under article 24 and states that the ‘proposals’ threaten the same. It is not clear what proposals he refers to as initially, the subject of the Petition was a lease. They additionally mention a lease being enacted and from the pleadings, it is not really discernible what the relevance of article 24 is to the petition and accordingly, there are no violations disclosed in this regard.
70. Under the head of threats to universal obligations in the state under Articles 3(1), 10, 19, 20, 21 and 259(1) of the Constitution 2010, the Petitioners have not disclosed any actions that have resulted in a violation of the Constitutional Articles therein. Further, the Petitioners contend that there is a threat to sovereignty and the supremacy of the Constitution by the ‘lease agreement which are impugned above’. They do not disclose with precision what actions have resulted in or if there are any violations that have occurred.
71. From a perusal of the Petition, it is barely comprehensible and does not disclose any constitutional issues but a grope in darkness, one that trudges between vague, unclear and improperly pleaded allegations of a civil nature and others relating to leasing of land. Further, a perusal of the prayers reveals that there are no constitutional issues this court is capable of determining raised in the Petition.
72. In the premises, the Preliminary Objection is merited as the Petition does not disclose any constitutional violations. The Preliminary Objection is allowed. The Petition dated 29th July 2024 are dismissed with costs to the Respondents.
73. Orders Accordingly.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 30TH DAY OF JUNE 2025.

HON. DR IUR NYAGAKA

JUDGE

